IN THE HIGH COURT OF GUJARAT AT AHMEDABAD

SPECIAL CIVIL APPLICATION No. 22343 of 2006
With
SPECIAL CIVIL APPLICATION No. 22344 of 2006
To
SPECIAL CIVIL APPLICATION No. 22345 of 2006

For Approval and Signature:

HONOURABLE MR.JUSTICE H.K.RATHOD Sd/-

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1 Whether Reporters of Local Papers may be allowed to see the judgment ?

2 To be referred to the Reporter or not ?

3 Whether their Lordships wish to see the fair copy of the judgment ?

4 Whether this case involves a substantial question of law as to the interpretation of the constitution of India, 1950 or any order made thereunder ?

5 Whether it is to be circulated to the civil judge ?

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M M AGRAVAT - Petitioner(s)
Versus
STATE OF GUJARAT & 1 - Respondent(s)

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Appearance :
MR BIPIN I MEHTA for Petitioner(s) : 1,
MR LB DABHI, A.G.P. for Respondent(s) : 1,
MR HS MUNSHAW for Respondent(s) : 2,

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CORAM : HONOURABLE MR.JUSTICE H.K.RATHOD

Date : 18/12/2006

ORAL JUDGMENT

1. Heard the learned advocate Mr. B.I. Mehta appearing on behalf of the petitioners, learned A.G.P. Mr. Dabhi appearing on behalf of the

respondent No.1 – State and learned advocate Mr. Munshaw appearing on behalf of respondent No.2 – Panchayat.

2. **Rule.** Learned advocates appearing on behalf of the respondents waive service of notice of rule on behalf of the respondents. With consent of all the learned advocates appearing on behalf of the respective parties, matters are to be taken up for final hearing today.

3. According to the petitioners, they were made permanent in the post of light man/peon by passing resolution even before that petitioner No.1 worked as daily wager and thereafter, the petitioner was made permanent. The benefit of pay-scale was given to the petitioners and petitioners were worked for more than 16 years against sanctioned posts. However, all of sudden without giving any opportunity to the petitioners, respondent – Panchayat has passed an order on 9th October 2006 reverting the petitioners from permanent posts of daily wager. Before passing the aforesaid order, no show cause notice and no opportunity was being given to the petitioners. Therefore, present petitioners have filed to challenge the order dated 9th October 2006.

4. Learned advocate Mr. Munshaw submitted that affidavit-in-reply on behalf of the respondent is filed. The copy thereof has been served to the petitioner and affidavit-in-reply has been taken on

record.

5. Learned advocate Mr. Munshaw submitted that irregular appointments have been made by body of Gram Panchayat which has been brought to the notice then immediate steps have been taken to suspend such resolution, even though, benefit has been given in favour of the petitioner by the Panchayat. However, subsequently, the Audit Department has objected to give subsequent benefit to irregular appointee. Therefore, accordingly, on 9th October 2006, Sarpanch has passed an order for implementing audit note for the audit year 1988, 1989 and 1990 – Para 8 and 9. Therefore, learned advocate Mr. Munshaw submitted that reversion order from permanent post to daily wager is legal and valid.

6. Learned advocate Mr. Mehta submitted that this order has been passed by Sarpanch of respondent No.1 – Panchayat without giving any opportunity of hearing to the petitioners. As a result of order dated 9th October 2006, which, adversely affect the status, prestige and pay of the petitioners. Therefore, before passing such order, respondent – Panchayat should have to follow the principles of natural justice which has not been followed by respondent – Panchayat.

7. Learned advocate Mr. Munshaw submitted that there is no need to give any opportunity to the petitioners as Resolution is already suspended by the

higher authority.

8. I have considered the submissions made by both the learned advocates appearing on behalf of the respective parties and I have also considered the question as to whether compliance of principles of natural justice is necessary or not ? Without considering the merits of the matter, this order dated 9th October 2006, when petitioners are working permanent Light Man / Peon have been reverted to daily wagers, having adverse effect in the pay, pension and status of the concerned petitioners. Therefore, whenever administrative order has been passed by the State Authority, having adverse effect or consequences to the existing service condition, principles of natural justice must have to be observed by the respondent – Panchayat, which has not been observed by respondent – Panchayat. For that, there is no averments made by the respondent – Panchayat in the reply. Therefore, such order, having adverse effect without giving any reasonable opportunity of hearing to the petitioners, is contrary to the principles of natural justice.

9. This Court has examined the same question in Special Civil Application No.21345 of 2006 dated 12th December 2006 in Para-7 to Para-12 which are quoted as under :

> *"7.* I have considered the submissions made by both the learned advocates appearing on

behalf of the respective parties and I have considered impugned orders 18.04.2006 and 18/22.08.2006. The petitioner is retired on 30.11.2006, and, this order has been passed by the respondent without giving opportunity to the petitioner. This order has changed the fixation which resulted in recovery having adverse consequences to the legal right of the petitioner, even though, principles of natural justice has not been followed by the respondent before passing such order. This Court has considered this question in Special Civil Application No.8420 of 2006 dated 29th September 2006. The relevant observations made in Para 11 and 12 which are quoted as under :

> *"11. The said aspect has been examined by Division Bench of this Court in* **LPA 562/96 in SCA 3/96 (State of Gujarat V/s. S.V. Shah) dated 11/3/2005***. The Division Bench of this Court has examined similar question relying upon the Apex Court decision in case of A.K.Kraipak v. Union of India, AIR 1970 SC 150 and Sayeedur Rehman v. State of Bihar, AIR 1973 SC 239. The observation which has been made by the Division Bench of this Court in para 1 is quoted as under:*
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> "In State of Orissa v. Dr.(Miss) Binapani Dei, AIR 1967 SC 1269, the Supreme Court recognised the

applicability of the rules of natural justice in purely administrative matters and laid down the following propositions:

I. The rule that a party to whose prejudice an order is intended to be passed is entitled to a hearing applies alike to judicial tribunals and bodies of persons invested with authority to adjudicate upon matters involving civil consequences. It is one of the fundamental rules of our constitutional set-up that every citizen is protected against exercise of arbitrary authority by the State or its officers. Duty to act judicially would, therefore, arise from the very nature of the function intended to be performed: it need not be shown to be super-added. If there is power to decide and determine to the prejudice of a person, duty to act judicially is implicit in the exercise of such power. If the essentials of justice be ignored and an order to the prejudice of a person is made, the order is a nullity. That is a basic concept of the rule of law and importance thereof transcends the significance of a decision in any particular case.

II. It is true that the order is

> administrative in character, but even an administrative order which involves civil consequences, as already stated, must be made consistently with the rules of natural justice after informing the first respondent of the case of the State, the evidence in support thereof and after giving an opportunity to the first respondent of being heard and meeting or explaining the evidence.

In A.K.Kraipak v. Union of India, AIR 1970 SC 150, the Supreme Court held that thin line of distinction between administrative and quasi judicial function is gradually diminishing and that the rule of fairness/rule of hearing must be read as implicit in every administrative action which results in an adverse order against an affected person.

In Sayeedur Rehman v. State of Bihar, AIR 1973 SC 239, the Supreme Court treated the unwritten right of hearing as a part of the concept of rule of law by making the following observations:

"This unwritten right of hearing is fundamental to a just decision by any authority which decides a controversial issue affecting the rights of the rival contestants. This right has its roots in the

notion of fair procedure. It draws the attention of the party concerned to the imperative necessity of not overlooking the other side of the case before coming to its decision,for nothing is more likely to conduce to just and right decision than the practice of giving hearing to the affected parties. The omission of express requirement of fair hearing in the rules or other source of power claimed for reconsidering an other is supplied by the rule of justice which is considered as an integral part of our judicial process which also governs quasi judicial authorities when deciding controversial points affecting rights of parties."

In Swadesi Cotton Mills v. Union of India, AIR1981 SC 818, S.L.Kapoor v. Jagmohan and others, AIR 1981SC 136, Smt. Maneka Gandhi v. Union of India, AIR 1978 SC 597, Olga Telis v. Bombay Municipal Corporation, AIR1986 SC 180 the Supreme Court reiterated and emphasized that every administrative action which visits a person with adverse civil consequences must be preceded by a notice and opportunity of hearing.

We have prefaced the disposal of this appeal by making reference to the above noted judicial precedents because the only legal issue which calls for determination by the Division Bench is

whether the learned Single Judge erred in quashing the action taken by the appellant for revising the pay scale of the respondent and effecting recovery from his pay on the ground of violation of rules of natural justice.

A perusal of the record shows that the respondent joined service as Sales Tax Inspector on 1.2.1973. In furtherance of Resolution dated 5.7.1991 passed by State Government, Commissioner of Sales Tax, Ahmedabad issued order dated 7.11.1992 and fixed the respondent's pay in the higher scale. After two years and about nine months the State Government vide Resolution dated 16.8.94 amended the earlier resolution and revised the criteria for grant of higher grade. As a sequel to the last mentioned resolution, Commissioner, Sales Tax, passed order dated 11.12.95 for re-fixing the pay of the respondent and recovery of the alleged excess paid to him.

The respondent challenged the re-fixation of his pay and consequential withdrawal of higher grade in Special Civil Application No.3/96 on various grounds, including the one that the action taken by non-applicants (appellants herein) is vitiated due to violation of the rules of natural justice.

In the reply affidavit on behalf of the appellants it was not disputed that the pay of the respondent had been re-fixed without giving him notice and opportunity of hearing, but an attempt was made to justify the impugned action on the basis of revised policy decision taken by the State Government.

The learned Single Judge held that the action taken by the competent authority to re-fix the respondent's pay was vitiated due to violation of the rules of natural justice. He, accordingly, quashed the revised fixation of the respondent's pay with liberty to the appellants to pass fresh order after complying with the rules of natural justice.

We have heard Shri A.Y.Kogje, learned Assistant Government Pleader, and with his assistance gone through the records.

Since it is an undisputed position that before re-fixing the respondent's pay and ordering recovery of the alleged excess amount paid to him, the appellants did not give any notice or opportunity of hearing, we have no hesitation to hold that the appellants had violated rule of *audi alteram partem* and the learned Single Judge did not commit any illegality by quashing order dated 11.12.95.

In Sayeedur Rehman's case (Supra), a somewhat similar question was considered by the Supreme Court in the backdrop of the fact that the management of the school had, after giving financial benefits to the appellant for the period during which he remained under suspension reviewed its decision without giving him notice and opportunity of hearing. Their Lordships held that even though action taken by the management was purely administrative in nature, the appellant was required to be heard before being deprived of the financial benefits given to him in pursuance of the earlier decision.

In the present case, it can not be denied that as a result of grant of higher grade the respondent had acquired the right to receive higher emoluments. Therefore, no order adversely affecting his right to be paid salary in the higher grade and/or for recovery of the amount already paid to him could have been passed without issuing him notice incorporating the basis of the proposed action and giving him a reasonable opportunity to put forward his defence. This having not been done, the learned Single Judge, in our opinion, rightly nullified the action taken by the appellant.

For the reasons stated above, Appeal is

dismissed.”

12. Recently, the Apex Court has considered the question of principles of natural justice in case of ***Suresh Chandra Nanhorya v. Rajendra Rajak & Ors.***, reported in ***2006 (9) Scale 264***. The relevant observations are in Para.8 to 11, which are quoted as under :

“8. Natural justice is an inseparable ingredient of fairness and reasonableness. It is even said that the principles of natural justice must be read into unoccupied interstices of the statute, unless there is a clear mandate to the contrary.

9. In the celebrated case of Cooper v. Wandsworth Board of Works,1963(143) ER 414, the principle was thus stated :

“Even God did not pass a sentence upon Adam, before he was called upon to make his defence. “Adam', says God, 'where art thou' has thou not eaten of the tree whereof I commanded thee that 'thou should not eat.”

10. Since then the principle has been chiselled, honed and refind, enriching its content. In Mullooh v. Aberdeen 1971 (2) All E.R. 1278, it was stated:

“the right of a man to be heard in his defence is the most elementary protection.”

11. Natural justice is the essence of

fair adjudication, deeply rooted in tradition and conscience, to be ranked as fundamental. The purpose of following the principles of natural justice is the prevention of miscarriage of justice."

9. The Apex Court has observed the issued involved in case of ***Sahib Ram v. State of Haryana and Others*** reported in ***1995 AIR SCW 1780***. The relevant Head Note is as under :

"Constitution of India, Art. 311 – Pay scale – Revision of – Govt. in consultation with University Grants Commission revising pay scales of Libraries in Govt. Colleges but insisting upon minimum educational qualifications – Relaxation of qualifications only as regards obtaining 1st/IInd class in prescribed qualification but not in educational qualifications itself – Appellant-Librarian not possessing required qualifications – Would not be entitled to relaxation – However, benefit of higher pay-scale given to appellant not on account of any misrepresentation made by appellant but by wrong construction made by Principal – Amount paid not ordered to be recovered under circumstances.

Wagers – Higher pay scale wrongly given – No fault of employee – Recovery not made."

10. The Calcutta High Court has also observed in

case of ***Kalyan Kumar Chattopadhyay v. State of West Bengal & Ors.,*** reported in ***2006 III CLR 131.*** The Head Note is relevant which is quoted as under :

> *"Constitution of India, 1950 – Arts. 14, 21, 226 – Retiral Benefits – Petitioner-Assistant Teacher retired on 31st January 2003 – Denied his retiral benefits despite repeated requests and demands – Hence this petition – Held that it was erroneous fixation of pay scale of the petitioner by officer concerned – No fault on the part of petitioner – Not advisable to recover such excess payments after retirement of the employee – It cannot be adjusted against retiral dues – Legally enforceable right of petitioner to stop such type of recovery – Mandamus can be enforced."*

11. The Calcutta High Court has also observed in case of ***Union of India through Secy., Ministry of Health and Family Welfare & Ors. v. Jangam Anant Amrutling*** reported in ***2006 III CLR 463.*** The Head Note is relevant which is quoted as under :

> *"Pay Fixation – Correction therein – Recovery of excess amount paid – Respondent was Laboratory Technician regularised w.e.f. 28.9.1984 in the pay-scale of Rs.380-560 – In pursuance of 4th Pay Commission recommendation, his pay was fixed in pay-scale of Rs.1400-2300 – In fact it should*

have been fixed in pay-scale of Rs.1320-2040 – Mistake came to light in 1999 – It was corrected after show cause notice and recovery of excess payment was sought to be made – Respondent therefore approached Central Administrative Tribunal who directed petitioner not to effect recovery of excess amount paid – Hence this petition – While dismissing this petition and confirming order of Tribunal, the decision of the Supreme Court in the case of Shyam Babu Verma v. Union of India 1994(2) SCC 521 is followed and it is held that Tribunal has not committed any error of law or jurisdiction in directing the petitioner not to recover excess amount from the respondent. It is an admitted position that the pay-scale of the respondent was sought to be rectified almost after a lapse of 11 years. Further, it is also admitted that the error was committed by the petitioners and the respondent was not in any way responsible. It is not the case of the petitioners that the error was on account of wrong representation made by the respondent.“

12. The Madras High Court has also held in case of ***D. Palavesamuthu v. Tamil Nadu Administrative Tribunal, represented by its Registrar, Chennai and others*** reported in ***(2006) 1 MLJ 143***. The Head Note is relevant which is quoted as under :

"Service Law – Petitioner promoted as Elementary School Headmaster – But paid salary of Special Grade Headmaster – Objections raised by the Accountant-General while scrutinizing pension papers – Tribunal upholding the objections of the Accountant-General – Held – Fault committed by the department and their officers and its petitioner cannot be penalised after lapse of number of years that too after retirement."

13. The High Court of Madras has also observed the said question in case of ***S. Ganapathy v. Commissioner of Commercial Taxes, Chennai and Another*** reported in ***(2006) 3 M.L.J. 532***. The relevant Para 15 and 16 are quoted as under :

"15. The law is well settled in this aspect. Normally when an official has been conferred with the benefit of promotion as well as with the pay scale and the same has been enjoyed for a considerable period, it is not open to the authority later to decide against him, on the basis that a mistake has been committed by giving promotion or pay fixation. That was decided by the Division Bench of this Court in D. Palavesamuthu v. Tamil Nadu Administrative Tribunal represented by its Registrar, Chennai and others 2006(1) MLJ 143. The Hon'ble Division

Bench of this Court while placing reliance on the judgment of the Apex Court in Sahib Ram v. State of Haryana AIR 1995 SCW 1780 : 1995 Supp(1) SCC 18 has laid down the distum as follows :

"Even if it is accepted for argument sake that salary of the petitioner is fixed in a wrong scale of pay, it is the fault committed by the Department and their Officers, for which the petitioner should not be penalised after a lapse of number of years that too after retirement of the petitioner."

16. Since the judgment of the Division Bench was based on the judgment of the Hon'ble Supreme Court, I feel it is relevant to extract the dictum laid down by the Supreme Court in Sahib Ram's case (supra). The Hon'ble Supreme Court has declared the law as follows :

"..... It is not on account of any misrepresentation made by the appellant that the benefit of higher pay-scale was given to him but by wrong construction made by the Principal for which the appellant cannot be held to at fault. Under these circumstances, the amount paid till date may not be recovered from the appellant..."

14. The Madurai Bench of Madras High Court has also observed in case of ***P. Arumugam v. Registrar, Tamil University, Thanjavur*** reported in ***(2006) 3 M.L.J. 1025***. The relevant Para 11.5 is quoted as under :

> *"11.5 In the above stated circumstances, the question that remains to be considered is as to whether the respondent can be permitted to re-work the fixation of pay and the excess payment, if any, paid to the appellant based on wrong fixation of pay right from 1.2.1984 and seek for recovery of a huge sum of Rs.3,95,093/- from the terminal benefits payable to the appellant. It is relevant to state that between 1.2.1984 i.e. the date of appointment of the appellant as Superintendent in the respondent University, till he was allowed to retire from service on 31.12.2001, the respondent did not raise its little finger as regards the alleged excess payment paid to the appellant. On the other hand, knowing fully well about the previous employment of the appellant, the respondent University in its offer of appointment, dated 13.6.1983 as well as the order of appointment dated 21.7.1983, specifically mentioned that the pay of the appellant was being fixed in a particular scale ensuring the pay last drawn by the appellant in his previous employment. That part, it is not known why inspite of the Audit Objections raised as early as in the*

year 1984-85, the respondent did not intimate the same to the appellant nor taken any proceedings for suitably re-fixing the pay fixed at the time of issuance of the order of appointment in accordance with Rule 44(4)(i) of the Tamil Nadu Pension Rules. The respondent thus, with its eyes wide open, fixed the pay of the appellant in a particular scale of pay applicable to him and also allowed him to draw that pay throughout his service in the respondent University till the date of his retirement. Therefore, while the respondent was squarely responsible for the wrong fixation of pay, if any, of the appellant, the appellant was never to be blamed as regards his pay fixation. Neither in the offer of appointment nor in the appointment order, the appellant was ever reminded about any intimation required as regards the receipt of pension in the erstwhile service rendered by him in the State Government."

15. The Apex Court has observed in case of ***Shri Shekhar Ghosh v. Union of India & Anr.*** Reported in ***2006(11) SCALE 363***. The relevant Head Note is quoted as under :

"SERVICE – REPATRIATION – Rectification of mistake in service records – Principles of natural justice required to be complied with

– A post decisional hearing in such a case not contemplated in law – Appellant was appointed as Khalasi in Railways in year 1981 – He was promoted as a Junior Clerk and transferred in one Railway Electrification Project – While working there as a Junior Clerk, he was promoted as a Senior Clerk in year 1987 on an ad hoc basis – On completion of the project, he was repatriated to his original office – A complaint made against appellant by four employees that he was not entitled thereto alleging that promotion granted to him was not a regular one – By an order dated 18.10.1996, he was repatriated to his original place of work – Respondents proceeded on basis that a mistake occurred in making an entry in the service book of appellant – No Inquiry held to arrive at a finding that appellant was guilty of charges levelled against him – Hearing sought to be given was post-decisional one – Copy of complaint not supplied to appellant – It is also not a case where a mistake was apparent on face of records – Whether appellant was entitled to a right of hearing – Held, Yes – Whether High Court was justified in holding that petitioner was rightly repatriated back to the workshop on the post of Khalasi – Allowing the appeal, Held.“

16. In view of the aforesaid observations made by

the Division Bench of this Court and Apex Court as referred above, the order dated 9th October 2006 is required to be quashed and set aside only on the ground that principles of natural justice have not been followed by the respondent – Panchayat.

17. In the result, the present petitions are allowed. The order dated 9th October 2006 is hereby quashed and set aside. Rule is made absolute to that extent. No order as to costs. Direct service is permitted.

Sd/-

[H.K. RATHOD, J.]

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